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IN THE

# Supreme Court of the United States

CLAUDE M. BALLARD, ET UX.,

*Petitioners,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF *AMICUS CURIAE* OF SEN. DAVID PRYOR AND THE ESTATE OF ROBERT W. LISLE; THE ESTATE OF DONNA M. LISLE; THOMAS W. LISLE, INDEPENDENT CO-EXECUTOR; AMY W. ALBRECHT, INDEPENDENT CO-EXECUTOR, IN SUPPORT OF THE PETITION FOR CERTIORARI

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## INTERESTS OF *AMICI CURIAE*[1]

Hon. David Pryor served as United States Senator from Arkansas from 1979 to 1996 and as a United States Representative from 1966 to 1973. While in the Senate, Senator Pryor served on the Senate Finance Committee, chairing a subcommittee with responsibility for oversight of the Internal Revenue Service. While in this position, he developed and introduced the first Taxpayer Bill of Rights which was enacted in 1988. See Omnibus Taxpayer Bill of Rights, Pub. L. No. 100-647, §§ 6226-35, 102 Stat. 3342, 3731. As a Member of the House of Representatives, Senator Pryor supported and voted for the Tax Reform Act of 1969, § 951, Pub. L. No. 91-172, 83 Stat. 730, which, in order to ensure neutrality and procedural regularity, removed the Tax Court (previously the Board of Tax Appeals) from the Executive Branch and transformed it into an Article I Court. See 115 Cong. Rec. H22809, 91st Cong. 2d Sess. (Aug 7, 1969) (roll call vote).

Senator Pryor's actions have been motivated by an abiding belief that taxpayers in the United States have basic rights, including the right to due process of law, a right that is infringed by the proceedings to which the taxpayers here have been subjected. In speaking on the floor of the Senate in support of his landmark 1988 legislation he said "The passage of the taxpayers' bill of rights will send, I think, a very clear message to our country and to all taxpayers, small and large, that taxpayers do in fact have certain basic due process rights . . . . " 134 Cong. Rec. S15073, S15074, 100th Cong. 2d Sess. (Oct. 7, 1988) (statement of Sen. Pryor).

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[1] In compliance with Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

"Like any good citizen," he said, "I believe that everyone should pay his or her lawful share of taxes. That is the price of freedom. However, at the same time that we are allowing the IRS to be more intrusive into the lives of our citizens for the sake of compliance, we must also ensure that we maintain basic due process rights, which have eroded slowly but surely over these past two and one-half decades." 134 Cong. Rec. S4134, 100th Cong. 2d Sess. (April 15, 1988) (statement of Sen. Pryor). Senator Pryor seeks to put his views before this Court because of his conclusion that, despite his legislative efforts, the secret procedures now used by the Tax Court and at issue here deprive taxpayers of those basic rights.

Taxpayers Robert and Donna Lisle ("the Lisles") were parties in the Tax Court proceeding under review here. As provided for by 26 U.S.C. §7482(b)(1)(A), because of their legal residence the Lisles' appeal from the adverse decision of the Tax Court was heard by a different Court of Appeals, the United States Court of Appeals for the Fifth Circuit, in a different case than that under review by this Court. See *Estate of Lisle v. Commissioner*, 341 F.3d 364 (5th Cir. 2003).[2] In that case, even despite the unavailability of the Special Trial Judges' report in this case, the Court of Appeals concluded that the credibility and other judgments of the Tax Court were insufficiently supported by the evidence to sustain the finding of fraud against Robert Lisle that formed the basis for most of the tax deficiency and penalties assessed against the Lisles. The Lisles died during the pendency of their appeal. Their estates appear before this

[2] A third Circuit Court of Appeals, the Seventh, has also considered an appeal from the underlying Tax Court decision here. See *Estate of Kanter v. Commissioner*, 337 F.3d 833 (7th Cir. 2003). A petition for rehearing and rehearing *en banc* is now pending before that court. Counsel for *amici* previously represented Petitioners in seeking to file a brief *amicus curiae* at the petition for rehearing stage in that case.



Court as *amici curiae* because of the denial of due process that it is now clear was wrought by the routine practice of the Tax Court utilized in the proceeding in which the remaining deficiency against the Lisles – the amount of which remains to be determined on remand in their case – was assessed.

## STATEMENT

**1.** This case presents a serious question of broad national importance involving the constitutionality of procedures routinely used by the Tax Court to impose substantial liability in the most serious class of tax cases it assigns to its Special Trial Judges. These procedures appear to have been deliberately hidden by that court and have only recently been acknowledged by the government – after the eleventh hour in this case – in oral argument in a separate Seventh Circuit appeal from the Tax Court decision at issue here, where the government clarified that it was not contesting that these procedures take place, but was, rather, defending their lawfulness. While a clear picture of the way in which the Tax Court has been operating came very late in the day – too late for consideration by the court below – even this last-minute concession by the Government drew a lengthy and thoughtful separate opinion in the Seventh Circuit from Judge Cudahy, in which he concluded that the procedures that led to the assessment of a tax deficiency in this very case violate the Constitution. See *Estate of Kanter v. Commissioner*, 337 F.3d 833, 874-88 (7th Cir. 2003) (Cudahy, J., concurring in part and dissenting in part).

These newly conceded procedures – unique in American law – by which the Tax Court decision was rendered in this case are utterly at variance with norms of procedural due process repeatedly articulated by this Court, and their ongoing use in this important class of cases is not contested. This matter therefore requires the urgent attention of this Court.

**2.** The Tax Court is an Article I court of record, precisely like the United States District Courts for the Virgin Islands and Guam, review of whose decisions is of course familiar to this Court. See 26 U.S.C. §7443; see also 26 U.S.C. §7441; 48 U.S.C. §1424. In much the same way the District Courts are permitted to appoint Magistrates, see 28 U.S.C. §631, the chief judge of the Tax Court "may, from time to time, appoint special trial judges . . ." 26 U.S.C. §7443A(a). The Chief Judge may assign any proceeding to a Special Trial Judge for trial. 26 U.S.C. §7443A(b). In a wide variety of proceedings, these Special Trial Judges are authorized to issue the opinion of the Tax Court. *Id.* §7443A(c).

In cases where the amount of the claimed deficiency exceeds $50,000.00, cases tried before a Special Trial Judge are subject, though, to the procedures detailed in Tax Court Rule ("Rule") 183. A separate rule provides the Special Trial Judge with authority to conduct trials, issue subpoenas, command production of evidence, rule on motions, conduct pretrial hearings, rule on evidentiary questions, and conduct similar proceedings. See Rule 181. Under Rule 183, after trial, briefs are to be submitted by the parties to the Special Trial Judge. Rule 183(a). He or she then "submits a report, including findings of fact and opinion" to the chief judge who assigns the case to one of the Tax Court Judges. Rule 183(b).

Rule 183(c) then provides: "The Judge to whom or the Division to which the case is assigned may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive further evidence or may direct oral argument, or may recommit the report with instructions." Rule 183(c).

Importantly, Tax Court Rule 183 mandates that "[d]ue regard shall be given to the circumstance that the Special



Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." *Id.* Review of the Tax Court's ultimate decision is available in the Courts of Appeals, which, by statute, must "review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C. §7482.

**3.** This case was tried by Special Trial Judge Couvillion. The trial involved alleged deficiencies of millions of dollars; indeed, the deficiency assessed against Petitioners alone (including penalties) amounted to $1,316,648. See Pet. App. 2a. The trial took five weeks and it "generated almost 5000 pages of transcript, more than 4600 pages of briefs and thousands of exhibits consuming hundreds of thousands of pages." *Kanter*, 337 F.3d at 838.

As required by law, Judge Couvillion prepared a Report, including findings of fact, which was submitted to the Chief Judge of the Tax Court. The case was then assigned to Tax Court Judge Dawson. One year and three months later, the Tax Court issued its opinion. The opinion, recites boiler plate language asserting that it "agrees with and adopts the *opinion* of the Special Trial Judge." *Id.* at 839 (emphasis added). It became clear in the proceedings before the Seventh Circuit in *Kanter* that identical language appears in *every other reported Tax Court opinion in a case tried by a Special Trial Judge issued since the Rule requiring publication of the Special Trial Judge's Report was repealed in 1983.* See *Kanter*, 337 F. 3d at 875-876 (Cudahy, J., concurring in part and dissenting in part) ("there exists not a single Tax Court decision since the adoption of current Rule 183 where a Tax Court Judge has purported to modify or reverse a finding of a Special Trial Judge"). Judge Cudahy thus correctly concluded that it is "impossible" that this language means that the Tax Court Judge adopted the

original Report of the Special Trial Judge given that what is involved is "a system of arms-length appellate style review involving 39 independent individuals." See *id.* at 875-876 (Cudahy, J., concurring in part and dissenting in part).

Whatever this language means – and it appears to refer to an opinion arrived at after in-chambers discussion by the Special Trial Judge and the Tax Court Judge that may contain modifications to the Report, see *id.* at 875-76 (Cudahy, J., concurring in part and dissenting in part) – the Commissioner has never contended, and does not now contend, that the Tax Court adopted without modification the "*Report*" of the Special Trial Judge. See Rule 183 (emphasis added).

Undisputed record evidence demonstrates – and since oral argument in the *Kanter* case in the Seventh Circuit, the Commissioner clearly does not now deny – that, despite the boiler plate language in the Tax Court's opinion, findings of fact relating to the credibility of witnesses and to intent to defraud contained in Judge Couvillion's Report were reversed in the Tax Court opinion issued by Judge Dawson. Nonetheless, the Tax Court has refused to give the parties *or the Courts of Appeals,* including the court below, *even under seal*, a copy of the Special Trial Judge's Report – a Report containing findings mandated by law, and to which "due regard" and a "presumption of correctness" were due by law – so that those courts can assess whether the Tax Court followed the law in rendering its decision.

The basis of the decision below is that the Tax Court's final opinion is "in fact, Special Trial Judge Couvillion's Report." Pet. App. 9a. Indeed, the court below said that "Were that not to be the case, we, too, would have significant concerns over the propriety of the process employed in this case." *Id.*



As Judge Cudahy's opinion in the *Kanter* case makes clear, the true nature of the Tax Court's treatment of the Special Trial Judge's report only became clear with the Commissioner's refusal to deny at oral argument that the procedure was as described in the text. It seems irrefutable that the factual premise of the panel's conclusion is wrong, though given the opacity of the Commissioner's position in this case in the court below, the court's error would certainly be more than understandable.

Nor is the procedure now defended by the Commissioner the alternative one described approvingly by the court below in dictum, in which "judges confer with one another . . . when more than one judge is charged with responsibility for the case." *Id.* Rather, as described in more detail below, it is now clear that this is a case of a reviewing judge conferring *ex parte* with the judge who made the determinations under review and of the reviewing court refusing even to make public the original determinations committed by law to that latter judge. As this Court well knows, it is "impossible" that different combinations of two judges with joint responsibility for deciding cases will agree in every one of several hundred reported decisions. *Cf. Kanter* 337 F. 3d at 875 (Cudahy, J., concurring in part and dissenting in part). The proceedings in *Kanter* reveal that what actually takes place in the Tax Court is not the alternative procedure the court below hypothesized.

The Government's Brief in Opposition here permits the Commissioner the opportunity to deny that the procedure is as we have described (and, for that matter, to deny that the Tax Court misleadingly refers to adoption of an "opinion" of the Special Trial Judge even when it does not adopt, but modifies, the Report of the Special Trial Judge that contains the determinations committed to him by law). The Commissioner will have the opportunity to explain how the Tax Court procedure actually works. We have no doubt that

the Commissioner will not deny it, but will defend the procedure as we describe it.

## ARGUMENT

### 1. The Courts of Appeals Cannot Consistent with Due Process Undertake Appellate Review of the Tax Court's Findings without Access to the Special Trial Judge's Report.

**a.** The Courts of Appeals are bound by law to review the Tax Court's findings of fact, including its finding of fraudulent intent here, for clear error. See, *e.g.*, *Pittman v. Commissioner*, 100 F.3d 1308, 1312-1313 (7th Cir. 1996). As Judge Cudahy said in his opinion dissenting in part in *Kanter*, "it is integral to the standard of clear error review that there be deference to the credibility findings of the official who has actually heard the witnesses." 337 F. 3d at 884-885 (Cudahy, J., concurring in part and dissenting in part).

Here, by keeping secret the Special Trial Judge's report, the Tax Court has denied the court below the very ability to examine those findings. Thus, as Judge Cudahy concluded, even if the Tax Court owes no deference to the Special Trial Judge's findings – so that it may itself somehow make findings of credibility *de novo* without hearing or seeing witnesses – the court below could not consistent with the requirements of due process review those findings for clear error without examining the original credibility determinations contained in the Special Trial Judge's Report. See *id.*

This Court has made clear, as a bedrock principle of our legal system, that Due Process is violated when a court is unable to perform the adjudication required of it on appellate review because it is not provided with materials that are



necessary for it to make the determination committed to it by law. See *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 618 (1993) (Due Process requires "a neutral and detached *adjudicat[ion]*.") (emphasis added); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433-434 (1982) (determination of a cause without "the opportunity to present [the] case and have its merits fairly judged," violates Due Process); *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (requirements of due process apply to appellate courts). Due process, that is, requires that a court adjudicating a case be permitted to do so on its merits. *E.g.*, *Logan* at 429. The refusal of the Tax Court to permit examination of the Special Trial Judge's Report prevents the Courts of Appeals from doing so.

**b.** Tax Court Rule 183 (c) provides "Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." Rule 183(c). The Courts of Appeals are, of course, bound to review decisions of the Tax Court for compliance with law, including compliance with Rule 183. See 26 U.S.C. §7453; see also, *e.g.*, *Service v. Dulles*, 354 U.S. 363, 388 (1957) (agency must comply with its own regulations).

Rule 183(c) by its plain terms commands some level of deference by the Tax Court to the Special Trial Judge's findings of fact. It is impossible for a Court of Appeals to determine whether a presumption of correctness has been given to the Special Trial Judge's findings of fact or due regard given to the Special Trial Judge's opportunity to evaluate the credibility of witnesses if that Court of Appeals is prevented, as the court here below was, from ever seeing those findings of fact. Again, appellate review for compliance with law where the reviewing court is not

provided with material necessary for it to make that determination violates Due Process. See *Concrete Pipe*, 508 U.S. at 618; *Logan*, 455 U.S. at 433-434.

**c.** The extraordinary nature of what goes on in the Tax Court can be seen in the remarkable order issued by the Tax Court when it refused to release Judge Couvillion's Report. The Tax Court actually asserted that "Judge Dawson presumed the findings of fact recommended by Special Trial Judge Couvillion were correct, and . . . gave due regard to the circumstance that Special Trial Judge Couvillion evaluated the credibility of witnesses." Tax Court Order of Aug. 30, 2000 (reprinted at Pet. 4-5 n. 3).

It is unimaginable that this Court would find as a matter of due process that a similar statement by a District Court (*e.g.*, "The judgment of this court is supported by the evidence.") provided a sufficient basis for Court of Appeals review of that court's judgment. And by law, the Courts of Appeals are to "review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C. §7482.

"Trust us, we did it right" is not an adequate basis for appellate review, and appellate review that can amount to nothing more than acceptance of such an assertion violates Due Process.[3]

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[3] The Tax Court procedure independently violates Article III of the Constitution. That provision vests in the Courts of Appeals the "judicial power" of the United States. In denying the possibility for meaningful adjudication of the questions of whether there is clear error in the Tax Court's findings of fact and whether that court has complied with the command of Rule 183, the refusal to provide the Special Trial Judge's original report so that it can be reviewed by this Court violates Article III. The procedure used by the Tax Court under which the Report is not available to the Courts of Appeals "remove[s] '"the essential attributes of the judicial power,"' from th[ose] Article III tribunal[s]." *Thomas v. Arn*, 474 U.S. 140, 154 (1985) (citations omitted).



**2. This Case Implicates A Split in Authority concerning the meaning of Tax Court Rule 183 (c).**

The proper and complete determination of this case requires an authoritative construction of Rule 183(c). By its plain terms that Rule commands some level of deference by the Tax Court to the Special Trial Judge's findings of fact. That is what the D.C. Circuit has held, see *Stone v. Commissioner*, 865 F.2d 342 (D.C. Cir. 1989), and it is a premise of one part of our constitutional argument here: It is impossible to determine whether a presumption of correctness has been given to the Special Trial Judge's findings of fact or due regard given to the Special Trial Judge's opportunity to evaluate the credibility of witnesses if the Courts of Appeals are prevented from ever seeing those findings of fact. (And, as described above, regardless of Rule 183(c), the clear error standard, too, cannot be applied by the Courts of Appeals without examination of the Special Trial Judge's Report.)

Despite Rule 183(c)'s requirements of "due regard" and presumption of correctness, the Seventh Circuit recently held the Rule does not "prescribe any particular level of

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The Tax Court's refusal to permit the court below to examine the Special Trial Judge's Report also violates 26 U.S.C. §7482. The Courts of Appeals are required by 26 U.S.C. §7482 to "review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." By rendering impossible review of its findings of fact for clear error, and by further rendering impossible review of its decision for compliance with Tax Court Rule 183, the Tax Court's refusal to permit the Courts of Appeals to examine the Special Trial Judge's report violates this statute.

deference due the [Special Trial Judge's] report," *Kanter*, 337 F. 3d 841. This squarely conflicts with the D.C. Circuit which held in *Stone* that this provision imposes upon the Tax Court Judge the duty to review the Special Trial Judge's findings of fact under a clearly erroneous standard of review. See *Stone*, 865 F. 2d at 347. The D.C. Circuit adheres to that construction. See, *e.g.*, *Landry v. Federal Deposit Insurance Corp.*, 204 F.3d 1125, 1133 (D.C. Cir. 2000).

Indeed, the Seventh Circuit actually held that the Tax Court may, without hearing the witnesses, overrule under a *de novo* standard of review the credibility findings of the judge who heard the case. This not only conflicts with the D.C. Circuit opinion in *Stone*, it raises grave, independent constitutional concerns. Cf. *United States v. Raddatz*, 447 U.S. 667, 681 n. 7 (1980).

Because the resolution of this case requires a definitive construction of Rule 183(c), it squarely implicates the split in authority among the Circuits. It therefore presents an appropriate vehicle – and indeed, given the overlay of the extraordinarily important due process question it involves, it presents an ideal vehicle – for this Court to address that split.

### 3. The Preparation of an "Opinion" Through *ex Parte* Discussions Between the Special Trial Judge and His or Her Legally Mandated Reviewing Judge Violates Due Process.

Finally, it is not only the truncation of appellate review that violates federal law in this case. The Tax Court procedures employed below, defended by the Commissioner and described by Judge Cudahy in *Kanter* independently render the proceedings before that tribunal violative of Due Process.



As the Tax Court Rules make clear, while Special Trial Judges can not decide cases in the class of this one, 26 U.S.C. §7443A, they act as fact finders required to submit "findings of fact." Rule 183(b). The Tax Court Judges to whom these cases are assigned are required to act as reviewing judges. See Rule 183(c). The premise of the dictum in the opinion below thus is plainly wrong. This is not a case where "more than one judge is charged with responsibility for deciding the case." Pet. App. 9a. This is a case where the responsibility for making a finding is committed by law to one judge, and the responsibility for reviewing it is committed by law to another.

Any process by which the finder of fact participates in private in the deliberations of a reviewing court amounts to an *ex parte* proceeding which violates Due Process. "Before one may be deprived of a protected interest, whether in a criminal or civil setting, one is entitled as a matter of due process of law to an adjudicator who is not in a situation 'which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true . . . .'" *Concrete Pipe*, 508 U.S. at 617-618 (citations omitted).

The presence within the deliberative chambers of a reviewing judge of the judge who rendered the decision under review clearly violates this bedrock principle. This would be no different than this Court conferring with a district judge whose opinion was under review. The Tax Court, after all, as this Court has explained with extraordinary clarity, is a court, not an administrative agency. See *Freytag v. Commissioner*, 501 U.S. 868, 891 (1991) ("The Tax Court exercises judicial power to the exclusion of any other function. . . . [Its] function and role in the federal judicial scheme closely resemble those of the federal district courts."). And this amounts to the

quintessential *ex parte* contact, a definitional violation of Due Process.[4]

Every Member of this Court should immediately see the extraordinary and improper nature of the Tax Court procedures that have come to light in this case, and the urgent need for this Court to act immediately to address them.

## CONCLUSION

The petition for certiorari should be granted and the case set for oral argument, or it should be granted, and the case below vacated and remanded for reconsideration in light of the facts about the Tax Court procedure made clear in the Seventh Circuit proceedings in *Kanter* and the government's clear acknowledgement there that the procedures of the Tax Court it defends are indeed as described herein.[5]

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[4] Nor can there be any doubt that the Special Trial Judge has performed an "adjudication" of the questions of fact determined in its findings and reviewed by the Tax Court. The Supreme Court has defined for purposes of due process the hallmarks of one who performs an adjudication and the Special Trial Judge has them all. See *Concrete Pipe*, 508 U.S. at 619. He or she is "a judge." *Id.* (internal quotation marks and citations omitted). He or she performs "judicial or quasi-judicial functions." *Id.* (internal quotation marks and citations omitted). He or she "hold[s] . . . hearing[s]." *Id.* And he or she hears "witnesses and rules on . . . disputed factual or legal questions." *Id.* (internal quotation marks and citations omitted).

[5] See, *e.g.*, *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) ("Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.").



Respectfully submitted,

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